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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE

14 IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

Case No. 5:11-cv-2509-LHK

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16 THIS DOCUMENT RELATES TO:
17 ALL ACTIONS
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**JOINT ADMINISTRATIVE MOTION TO
STRIKE THE CONFIDENTIAL
SETTLEMENT COMMUNICATION
DISCLOSED IN THE JOINT CASE
MANAGEMENT STATEMENT OR, IN
THE ALTERNATIVE, FILE UNDER
SEAL**

Pursuant to Local Civil Rules 7-11 and 79-5, defendants Adobe Systems, Inc., Apple Inc., Google Inc., and Intel Corporation (collectively, “Defendants”) hereby jointly move to strike Section 5 of the Joint Case Management Statement dated March 20, 2014 [Dkt.735] or, in the alternative, file Section 5 under seal.

Section 5 describes information that was revealed to Plaintiffs in the course of confidential settlement discussions and as part of a Court-ordered mediation. Although mediation and settlement communications are protected from disclosure and should not be revealed in a court filing, Plaintiffs refused to withdraw their reference to such confidential communications in the Joint Case Management Statement. As a result, Defendants were forced to file this motion.

For the reasons stated below, Section 5 should be stricken from the Joint Case Management Statement entirely. At a minimum, Section 5 should be sealed and redacted from the public version and any discussion at the March 27 Case Management Conference of the matters in Section 5 should take place *in camera*.

I. LEGAL STANDARD

This Court has inherent authority to “determine what appears in the court’s records.” *Ready Transp., Inc. v. AAR Mfg.*, 627 F.3d 402, 405 (9th Cir. 2010). The Court can exercise this power to strike improperly filed confidential documents. *See id.* (“In light of the powers district courts possess . . . to determine what appears in the court’s records, we therefore hold that the District Court erred when it concluded it was powerless to strike the confidential settlement agreement from the public docket.”); *see also Zepeda v. PayPal, Inc.*, Nos. C 10–2500 SBA & C 10–1668 SBA, 2013 WL 2147410 at *3 (N.D. Cal. May 15, 2013) (“The law is clear that district courts have the inherent power to control their docket, and in the exercise of that power, they may properly strike improper documents.”).

Additionally, Local Civil Rule 79-5(b) provides that a sealing order may issue “upon a request that establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law.” The Ninth Circuit has carved out an exception to the presumption of access to judicial records for non-dispositive motions and documents attached thereto, where the requesting party shows good cause to keep the records

under seal. *Navarro v. Eskanos & Adler*, No. C-06 02231, 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal. March 22, 2007) (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (“[A] ‘particularized showing’ under the ‘good cause’ standard of Rule 26(c) will ‘suffice[] to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.”); see also *Pintos v. Pacific Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009) (“In light of the weaker public interest in nondispositive materials, we apply the ‘good cause’ standard when parties wish to keep them under seal.”)).

II. THE CONFIDENTIAL SETTLEMENT INFORMATION IN SECTION 5 OF THE JOINT CASE MANAGEMENT STATEMENT SHOULD BE STRICKEN, OR ALTERNATIVELY, FILED UNDER SEAL

The information referenced in Section 5 of the Joint Case Management Statement is confidential information that was revealed to Plaintiffs only in the course of confidential settlement discussions, as part of the Court-ordered mediation between the parties, and pursuant to Federal Rule of Evidence 408 and the underlying policy that such discussions shall be maintained in confidence.¹ Defendants have consistently treated this information as highly confidential. Despite the obvious confidential and privileged nature of this information, Plaintiffs refused to remove their reference to it in the Joint Case Management Statement.²

Nothing discussed during mediation or settlement discussions is ever meant to be made public or revealed to the Court because confidentiality is essential to successful resolution through mediation and settlement. Indeed, the efficacy of mediation in general—and the ongoing settlement discussions in this case in particular—would be significantly undermined if there were a possibility that facts revealed in confidence could be discussed in court filings or made a matter of public record by one’s adversary. For those very reasons, the Northern District of California’s ADR Local Rules fiercely protect the confidentiality of matters disclosed during mediation. The Rules forbid disclosure of “anything that happened or was said . . . by any participant in connection with any mediation.” ADR L. R. 6-12. Federal law protects the confidentiality of settlement discussions. Fed. R. Evid. 408. California law also recognizes the paramount

¹ See Declaration of Justina K. Sessions (“Sessions Decl.”) ¶ 2.

² *Id.* ¶ 3.

1 importance of keeping settlement and/or mediation discussions confidential. The California
2 Evidence Code provides that “all communications, negotiations, or settlement discussions by and
3 between participants in the course of a mediation or mediation consultation shall remain
4 confidential.” Moreover, no evidence of anything that is said and/or any writing prepared in the
5 course of, for the purpose of, or pursuant to a mediation is admissible or subject to discovery.
6 Cal. Evid. Code § 1119. Plaintiffs’ inclusion of information learned through confidential
7 settlement discussions in the Joint Case Management Statement is thus entirely improper, and
8 Section 5 should be stricken from the statement.

9 At a minimum, good cause exists to seal the confidential information in Section 5 and
10 redact it from the publicly-filed version of the statement. When weighing the public’s interest in
11 learning the information referenced in Section 5 (shared with Plaintiffs in confidence) against the
12 irreparable prejudice to Defendants if that information is publicly disclosed, the scales tip heavily
13 against public disclosure. First, the public has little (if any) legitimate interest in learning the
14 information because it is not relevant to any of the substantive issues in this case. Indeed,
15 Plaintiffs fail to point to any legitimate reason why such information is relevant here. (They also
16 fail to cite any relevant legal authority to support their argument that this information is relevant.)
17 Yet, if the information were disclosed, it would have the potential to significantly and irreparably
18 prejudice Defendants by revealing confidential information that was disclosed only for purposes
19 of seeking to achieve an amicable resolution of this dispute.

20 For these reasons, Defendants request that Section 5 of the Joint Case Management
21 Statement dated March 20, 2014 [Dkt. 735] be stricken or, in the alternative, placed under seal.
22 Defendants further request that any discussion at the March 27 Case Management Conference of
23 the matters in Section 5 take place *in camera*.

1 Dated: March 21, 2014

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20 **ATTESTATION:** The filer attests that concurrence in the filing of this document has been
21 obtained from all signatories.
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